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SECURITIES AND EXCHANGE COMMISSION  
(Release No. 34-69164; File No. SR-ISE-2013-07)

March 18, 2013

Self-Regulatory Organizations; International Securities Exchange, LLC; Order Approving Proposed Rule Change to Amend International Securities Exchange, LLC Amended and Restated Constitution

I. Introduction

On January 13, 2013, the International Securities Exchange, LLC (“Exchange” or “ISE”) filed with the Securities and Exchange Commission (“Commission”), pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (“Act”)<sup>1</sup> and Rule 19b-4 thereunder,<sup>2</sup> a proposed rule change to amend its Amended and Restated Constitution<sup>3</sup> (the “ISE Constitution”) to declassify the Non-Industry Directors of the board of directors, change the term of the Non-Industry Directors and the Former Employee Director to a one-year term, and eliminate the three-term limit for the Former Employee Director. The proposed rule change was published for comment in the Federal Register on February 1, 2013.<sup>4</sup> The Commission received no comments on the proposal. This order approves the proposed rule change.

II. Description of the Proposal

As described more fully in the Notice, the Exchange’s proposal would amend the ISE Constitution to: (i) declassify the Non-Industry Directors (including the Public Directors) of the Board; (ii) change the term of the Non-Industry Directors (including the Public Directors) and the

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<sup>1</sup> 15 U.S.C. 78s(b)(1).

<sup>2</sup> 17 CFR 240.19b-4.

<sup>3</sup> Amended and Restated Constitution of International Securities Exchange, LLC (last amended December 28, 2007).

<sup>4</sup> See Securities Exchange Act Release No. 68740 (January 28, 2013), 78 FR 7470 (“Notice”).

Former Employee Director to a one-year term, subject to re-election; and (iii) eliminate the three-term limit for the Former Employee Director.

Currently, Section 3.2(c) of the ISE Constitution requires, in part, that both Non-Industry Directors (including the Public Directors)<sup>5</sup> and Exchange Directors<sup>6</sup> be classified into two classes designated as Class I and Class II directors, and that all Directors (including the Former Employee Director)<sup>7</sup> serve two-year terms, subject to re-election.

ISE has proposed to amend Section 3.2(c) of the ISE Constitution to: (i) remove any reference to Class I directors or Class II directors for Non-Industry Directors (including Public Directors); and (ii) state that the Non-Industry Directors (including the Public Directors) would hold office for a one-year term, subject to annual re-election for additional terms. In the Notice, ISE noted that, the rule change would not affect the manner of election of Non-Industry Directors (including the Public Directors), who would continue to be elected by the Sole LLC Member at each annual meeting of the Sole LLC Member and the holders of Exchange Rights in accordance with Section 3.2 of the ISE Constitution.

Similarly, ISE has proposed to modify the term of the Former Employee Director so that any such director shall hold office for a one-year term, subject to re-election, and to make conforming technical changes to the applicable parts of Section 3.2(c).

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<sup>5</sup> Section 3.2(b)(iv) of the ISE Constitution requires that the Board be composed of eight Non-Industry Directors (at least two of which are Public Directors) elected by the Sole LLC Member.

<sup>6</sup> Section 3.2(b)(i)-(iii) of the ISE Constitution requires that the Board be composed of six Exchange Directors elected by the holders of Exchange Rights.

<sup>7</sup> Section 3.2(b)(vi) of the ISE Constitution allows the Sole LLC Member, in its sole and absolute discretion, elect one additional director who shall meet the requirements of “Non- Industry Directors,” except that such person was employed by the Exchange at any time during the three-year period prior to his or her initial election.

Finally, the proposal would eliminate the three-term limit for the Former Employee Director.<sup>8</sup> In the Notice, ISE observed that, with these modifications, the Former Employee Director would qualify to become a Non-Industry Director after serving on the Board of Directors for three years as he or she would no longer have been employed by the Exchange in the previous three-year period after his or her initial election. As such, according to ISE, there would no longer be a need for the three-term limit.

According to ISE, the declassification of the Non-Industry Directors, and the institution of a one-year term for Non-Industry Directors and the Former Employee Director, subject to re-election, would allow the Exchange to align its Board structure in accordance with corporate governance best practices guidelines that advocate the repeal of classified or staggered boards and the institution of annual elections of directors. The best practices cited by ISE include, but are not limited to, the Institutional Shareholder Services Proxy Voting Guidelines, the CalPERS Core Principles of Accountable Corporate Governance, the TIAA-CREF Policy Statement on Corporate Governance, and the AFI-CIO Proxy Voting Guidelines. Although ISE has only one shareholder, as opposed to many shareholders in a public company, the Exchange nonetheless stated its belief that adherence to the aforementioned corporate governance best practices guidelines would be beneficial to the Exchange in that they would provide for flexibility, transparency, and accountability for the sole shareholder and, ultimately, for the members of the Exchange and the customers of the Exchange members. According to ISE, the proposed modifications to the ISE Constitution would provide ISE with the most flexibility to structure the board of directors in a way that is most effective for: (i)

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<sup>8</sup> Section 3.2(e)(iv) of the Constitution provides that a Former Employee Director may not serve on the Board of Directors for more than three consecutive terms. Any such director may be eligible for election as a director following a two-year hiatus from service on the Board of Directors, provided, that he or she meets the director qualifications pursuant to Section 3.2(b).

attracting and keeping Non-Industry Directors and the Former Employee Director who provide valuable insight and knowledge to the Board; (ii) providing the Sole LLC Member with the ability to evaluate and hold accountable Non-Industry Directors and the Former Employee Director on an annual basis; and (iii) removing an underperforming, inactive, or ineffective Non-Industry Director or Former Employee Director who may be detrimental to the enhancement of long-term corporate value.

In the Notice, ISE noted, however, that it was not proposing any changes to the current requirements in the ISE Constitution that specify that Exchange Directors serve two-year terms in a classified manner. The Exchange stated its belief that the current structure continues to be an effective and practical mechanism for ensuring continuity and fair representation of the Exchange's membership on the Board. ISE further noted that Exchange Directors represent the membership of the Exchange on the Board of Directors. Due to the connection between the Exchange's business and each Exchange Director's underlying business, ISE also stated that it believes that Exchange Directors provide a very different perspective from the Non-Industry Directors and the Former Employee Director. Specifically, according to ISE, Exchange Directors not only have an interest in seeing certain Exchange initiatives through to implementation, but are uniquely positioned to offer valuable feedback on such initiatives directly to the Board of Directors. Given the regulatory nature of the Exchange's business and the extended period of time necessary to see initiatives through to implementation, the Exchange stated that a term longer than one year is necessary for Exchange Directors to achieve the full benefit of participation of the Board. The Exchange also noted that the classified structure of the Exchange Directors allows for a more consistent representation of the Exchange's membership on the Board of Directors. By never having a whole slate of new Exchange Directors join the Board at the same time, the Exchange stated its belief that the classified

structure allows incumbent Exchange Directors to provide leadership and continuity to new Exchange Directors and the Board of Directors, as a whole.

As to implementation, under the Exchange's proposal, the declassification changes to the Board of Directors would be implemented through a process in which each current Non-Industry Director (including the Public Directors) will serve out the remainder of his or her two-year term, and any subsequent election or re-election of a Non-Industry Director (including any Public Director) vacancy will be for a one-year term. ISE noted that this process would result in all Non-Industry directors being declassified at the conclusion of the Exchange's 2014 annual meeting.

### III. Discussion and Commission Findings

After careful review, the Commission finds that the proposed rule change is consistent with the requirements of the Act and the rules and regulations thereunder applicable to a national securities exchange.<sup>9</sup> In particular, the Commission finds that the proposed rule change is consistent with Section 6(b)(1) of the Act,<sup>10</sup> which requires, among other things, that an exchange be so organized and have the capacity to be able to carry out the purposes of the Act and (subject to any rule or order of the Commission pursuant to Section 17(d) or 19(g)(2) of the Exchange Act) to enforce compliance by its members and persons associated with its members with the provisions of the Exchange Act, the rules and regulations thereunder, and the rules of the Exchange and consistent with Section 6(b)(5) of the Act,<sup>11</sup> which requires that the rules of an exchange be designed, among other things, to promote just and equitable principles of trade, to prevent fraudulent and manipulative acts, to remove impediments to and to perfect the

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<sup>9</sup> In approving this proposed rule change, the Commission has considered the proposed rule's impact on efficiency, competition, and capital formation. See 15 U.S.C. 78c(f).

<sup>10</sup> 15 U.S.C. 78f(b)(1).

<sup>11</sup> 15 U.S.C. 78f(b)(5).

mechanism for a free and open market and a national market system, and, in general, to protect investors and the public interest.

ISE has proposed, in part, to declassify the Non-Industry Directors (including the Public Directors) of the ISE board. The Commission finds the declassification of the Non-Industry Director members (including the Public Directors) of the ISE board in the manner proposed to be consistent with other self-regulatory organization governance structures that were approved by the Commission.<sup>12</sup>

Moreover, ISE has proposed, in part, to change the term of the Non-Industry Directors (including the Public Directors) and the Former Employee Director to a one-year term, subject to re-election. The Commission finds the one-year term for Non-Industry Directors (including the Public Directors) and for the Former Employee Director to be consistent with the Act.

The Commission notes that the elimination of the term limit for the Former Employee Director will have no practical effect on board composition at ISE. As proposed, an ISE director who serves as the Former Employee Director for three years will have been, by definition, a former employee of ISE for those three years, and could thereby meet the requirements to serve as a Non-Industry Director. The Commission finds the elimination of this term limit to be consistent with the Act.

Finally, the Commission notes that ISE will not be making any other changes to its governance structure other than those specifically described in this filing. Under the proposed rule change, the ISE Constitution would continue to provide that eight of the members of the

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<sup>12</sup> See Securities Exchange Act Nos. 56955 (December 13, 2007); 72 FR 71979, 71981 fn. 33 (December 19, 2007) (File No. SR-ISE-2007-101) (approving declassification the board for ISE's parent, International Securities Exchange Holdings, Inc.); 51741 (May 25, 2005); 70 FR 31558 (June 1, 2005) (File No. SR-NASD-2005-054) (approving declassification of the board for NASD).

Exchange's board of directors – out of a maximum total of 16 members – must be non-industry representatives. This proposed balance with respect to the composition of the Exchange's Board is consistent with other self-regulatory organization governance structures that were approved by the Commission,<sup>13</sup> and the Commission continues to believe that this board composition is consistent with the Act.

#### IV. Conclusion

IT IS THEREFORE ORDERED, pursuant to Section 19(b)(2) of the Act,<sup>14</sup> that the proposed rule change (SR-ISE-2013-07) be, and it hereby is, approved.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.<sup>15</sup>

Kevin M. O'Neill  
Deputy Secretary

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<sup>13</sup> See, e.g., Securities Exchange Act Release No. 54494 (September 25, 2006), 71 FR 58023 (October 2, 2006) (File No. SR-CHX-2006-23). See also Securities Exchange Act Release No. 56211 (August 6, 2007); 72 FR 45287 (August 13, 2007) (File No. SR-ISE-2007-34).

<sup>14</sup> 15 U.S.C. 78s(b)(2).

<sup>15</sup> 17 CFR 200.30-3(a)(12).